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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PACIFIC PEJIU WU RESTAURANT PARTNERS, L.P., **Plaintiff and Respondent,** **v.** **JAMES HARAMIS,** **Defendant and Appellant.**	**A123117, 123918, 124430** **(San Francisco County Super. Ct. No. CGC-05-442648)**

In these consolidated appeals, James Haramis (Haramis) challenges a judgment regarding the calculation of rent for a renewal term under a commercial lease, as well as subsequent orders awarding costs and attorney fees to respondent. Haramis contends the trial court erred in: (1) misinterpreting a modification to the lease and improperly admitting parol evidence; (2) finding that he waived his right to the renewal term base rent that he asserted should apply; (3) ruling that he waived his right to damages for respondent's alleged breaches of the lease; (4) imposing a terminating sanction against Haramis, as an alternative basis for the judgment, for egregious and pervasive misconduct in discovery and at trial; and (5) imposing post-judgment interest on costs and attorney fees as of the date of the entry of judgment, even though the amounts of the cost award and attorney fees award were determined by later orders.

We will affirm the judgment and the orders awarding costs and attorney fees.

I. FACTS AND PROCEDURAL HISTORY

This dispute is between appellant Haramis and his commercial tenant, respondent Pacific Pejiu Wu Restaurant Partners, L.P., concerning the interpretation of a modification to a lease executed by their respective predecessors-in-interest. We begin our overview of the events with a description of the negotiation of the lease and modification, mindful of Haramis' objection to this parol evidence.

A. *The 1993 Restaurant Lease*

As of 1993, corporation Chong Kee Jan (CKJ) owned a multi-tenant commercial building at 2030 Union Street in San Francisco. Beginning in February 2003, CKJ, represented by broker John Ng (Ng), leased the building's street-level restaurant space to Pacific PJW Restaurants, Inc., a corporation that had been formed by George Chen (Chen).

1. *The Lease*

The Lease had an initial 10-year term and two separate five-year renewal options.

Article 3 of the Lease required the tenant to pay a "base rent" plus a "percentage rent." The base rent, for the first five years of the Lease, was a fixed amount. Beginning in the sixth year, and for each of the seventh through tenth years, the base rent was to equal the previous year's base rent plus any increase in the Consumer Price Index for the San Francisco Bay Area (CPI), with a minimum increase of four percent and a maximum increase of eight percent. (The parties and the trial court at times refer to this as the base rent increased by the "bracketed CPI," as shall we.) The percentage rent was two percent of gross sales in excess of a "Breakpoint" (starting at $1,200,000).

During any renewal terms, the base rent would not be calculated according to Article 3, but according to Article 22. Section 22.2 provided: "the Base Rent for each Renewal Term (the "Renewal Term Base Rent") shall be equal to *ninety percent (90%) of the prevailing fair market rate* for the Premises during each Renewal Term as determined as of the date of commencement of each Renewal Term but in no event shall such Renewal Term Base Rent be less than the Base Rent immediately prior to such Renewal Term." (Italics added.) In other words, if the tenant exercised the renewal option for

years 11 through 15, under Section 22.2 the "Renewal Term Base Rent" in year 11 would be 90 percent of the fair market rate as of the beginning of year 11. Then, pursuant to Section 22.4, in each of years 12-15 the base rent would be increased by the bracketed CPI.

If the tenant exercised the second renewal option for years 16-20, the base rent for those years would be recalculated pursuant to Sections 22.2 and 22.4. In year 16, the base rent would be equal to 90 percent of the fair market rate as of the beginning of year 16, and the base rent would thereafter be adjusted by the bracketed CPI in each of years 17-20.

For purposes of calculating the base rent for each of the two renewal periods, therefore, it would be necessary to determine the "fair market rate." Under the Lease, this determination was to be accomplished by the "Option Rent Procedure" set forth in Section 22.3. Under this provision, the landlord would give the tenant its determination of 90 percent of fair market rent by a certain deadline, and if the tenant disagreed with the landlord's determination, the tenant would commence an appraisal process. Specifically, Section 22.3 provided: "Landlord shall give notice ('Landlord's Determination Notice') to Tenant of Landlord's determination of the Renewal Term Base Rent within thirty (30) days after the date by which Tenant is obligated to notify Landlord of Tenant's election to exercise its option. If Tenant disagrees with Landlord's determination, Tenant shall give notice ('Tenant's Notice of Disagreement') to Landlord within thirty (30) days of receipt of Landlord's Determination Notice. If Tenant gives Tenant's Notice of Disagreement, then the Renewal Term Base Rent shall be determined" by an appraiser appointed by the Tenant within 15 days of its Notice of Disagreement. If the Landlord then disagrees with the appraiser's determination, the Landlord can appoint a second appraiser. If the two appraisers cannot agree, the appraisers must appoint a third appraiser, whose determination will be binding.

Pursuant to Section 22.5, the Renewal Term Base Rent could not be less than the base rent payable during the month immediately preceding the commencement of the renewal term.

2. *Restaurant Space Vacant and Building Unsold*

Chen had intended to open an Asian-style tasting restaurant named "Betelnut." Because he could not raise sufficient capital to open the restaurant, however, the space remained empty.

Around the time it entered into the Lease in February 1993, CKJ began to try to sell the building. With the building's street-level anchor restaurant space vacant, the building was not sold.

B. *The 1995 Modification of the Lease*

Chen finally located two potential investors for his Betelnut restaurant: William Upson (Upson) and William Higgins (Higgins), experienced restaurant developers and operators, who had created numerous successful, long-running restaurants.

Upson liked Chen's restaurant concept and the building's location, but did not like the Lease. His primary objection was that the base rent for the first year in each of the Lease's two five-year renewal options was to be set at 90 percent of the prevailing fair market rate. As Upson would later testify at trial, the options had no value to him because he did not know, and could not budget for, what the rent would be at the start of each renewal term. In order to recoup the substantial investment required to build out the restaurant space, Upson required a long-term lease with more predictable rent increases.

Upson and Higgins therefore agreed to invest with Chen and take over the Lease *if* Landlord CKJ would agree to the changes Upson required. The three formed a new corporation (Pejiu Wu, Inc.), which would take an assignment of the Lease if the negotiations with CKJ were successful.

The negotiations were conducted through representatives. Upson, acting on behalf of Pejiu Wu, Inc., was represented by broker Kazuko Morgan (Morgan). CKJ was represented by its broker Ng, who had negotiated the Lease, and its attorney Frank Yuen (Yuen), who had drafted the Lease.

1. *Morgan's Letter to Ng*

Upson informed Morgan of the important issues he wanted her to raise with CKJ. He also helped Morgan draft a letter to Ng, dated May 19, 1995, and approved and signed the letter as well. A copy of the letter was sent directly to CKJ.

Morgan's May 19 letter confirmed certain changes to be made to the Lease. Item 3 of the letter provided that the CPI indicator used to adjust the base rent would also be used to adjust the Breakpoint in years six through 10, and the "same terms shall apply in years *11*-20 should the Tenant exercise the option to renew the lease." (Italics added.) Item 8 of the letter read as follows: "Existing two (2), five (5) year options shall be replaced by one (1), ten (10) year option at the same terms as the base lease with rental increases based on CPI with a minimum of 4% and a maximum of 8%." At trial, Upson explained: "What I meant by [item 8] was that we wanted the lease adjusted from the two five years to one ten and *removal of the fair market adjustment at 90 percent* to reflect a continued CPI increase not to be less than four percent and more than eight percent annually." (Italics added.)

2. *Ng's Letter to Morgan*

By letter dated May 24, 1995, Ng replied to Morgan, stating: "Your letter modifying the terms of the lease modifications we previously agreed to appears to be *acceptable to the landlord*," with certain exceptions not relevant here. (Italics added.) Further, Ng advised, upon receipt of certain monies, documents, and information, "Landlord shall instruct its attorney [Yuen] to draft the necessary lease assignment and amendments in an expeditious manner." The letter indicates that a copy of this letter was sent to CKJ, and an officer of CKJ signed an acknowledgement that he had "read, received, under[stood] and approve[d] of the terms as hereinabove stated."

3. *Preparation of the Modification*

Yuen drafted a modification of the lease at CKJ's direction. On June 6, 1995, CKJ and Chen signed this modification, before Upson had seen it, along with an assignment of the Lease from Pacific PJW Restaurants, Inc. to Pejiu Wu, Inc. The next day, Morgan faxed the signed modification to Upson. Upson in turn sent it to Norman Zilber (Zilber),

the attorney for Pejiu Wu, Inc., asking Zilber to make sure Yuen's modification reflected the deal points in the Morgan-Ng letters.

The only change Zilber made to Article 22 in Yuen's modification – pertaining to the renewal option and the rent for the renewal term – was to add a Section 22.6, which addressed a CPI adjustment to the Breakpoint. Zilber then sent his draft to Upson for his review, was instructed to put it in final form, and did so. Zilber sent the re-typed modification to Morgan on June 8, 1995.

CKJ and Chen (on behalf of Pejiu Wu, Inc.) signed the Modification as redrafted by Zilber and approved by Upson. This is the operative modification of the Lease (Modification).

4. *The Modification*

The Modification provides, among other things, that Article 22 of the Lease was "modified as follows." The Modification then sets forth new versions of Sections 22.1, 22.2, and 22.4, adds Zilber's new Section 22.6, and omits any Section 22.3 or 22.5.

In the new Section 22.1, the Landlord grants the Tenant one 10-year option, as opposed to the two five-year options granted by Lease Section 22.1.

The new Section 22.2 sets forth the base rent for the first year of the 10-year renewal term: "If Tenant elects to exercise the Renewal Option, . . . the Base Rent for the Renewal Term (the 'Renewal Term Base Rent') shall be *determined as set forth in paragraphs [sic] 22.4*." (Italics added.) Thus, while Lease Section 22.2 provided that the base rent for each of the two five-year renewal terms under the Lease would be "equal to ninety percent (90%) of the prevailing fair market rate," Modification Section 22.2 provides that the base rent for the new ten-year renewal term would be "determined as set forth in paragraphs 22.4."

As mentioned, the Modification does not contain a Section 22.3. In the Lease, Section 22.3 had referred to the Option Rent Procedure, governing the determination of 90 percent of the prevailing fair market rate.

The new Section 22.4 reiterates Section 22.4 of the Lease, changing the reference to "each" renewal term to "the" renewal term. In pertinent part, Section 22.4 of the

Modification reads: "The Base Rent for the first Lease Year of the Renewal Term shall be the Renewal Term Base Rent. On the first day of the Second Lease Year of the Renewal Term and on the first day of each Lease Year of the Renewal Term thereafter (each, a 'Renewal Term Adjustment Date'), the Renewal Term Base Rent shall be *adjusted by" the bracketed CPI*. (Italics added.)

The Modification does not contain a Section 22.5. In the Lease, Section 22.5 had guaranteed that the Renewal Term Base Rent would not be less than the base rent payable during the month immediately preceding the commencement of any Renewal Term.

The new Section 22.6, added by Pejiu Wu, Inc.'s attorney Zilber, provides: "At the same time and manner as the Renewal Term Base Rent is determined under *Section 22.3*, the new Breakpoint for the Renewal Term ('Renewal Breakpoint') shall be established. Commencing on the first day of the Second Lease Year of the Renewal Term and on the first day of each and every subsequent Lease Year during the Renewal Term, the Renewal Breakpoint shall be adjusted by the same CPI indicator as the Renewal Term Base Rent under Section 22.4." (Italics added.) In other words, the Breakpoint would be increased by the bracketed CPI in years 11-20 (resulting in a lower Percentage Rent), just as the Base Rent would be increased by the bracketed CPI in years 11-20.[1]

The reference in Modification Section 22.6 to "Section 22.3" is curious, because there is no Section 22.3 in the Modification. As we shall see, Haramis contends that the reference to "Section 22.3" alluded to *Lease* Section 22.3, which provided the Option Rent Procedure for determining 90 percent of fair market rate, thus demonstrating (in Haramis' view) that the base rent for the first year of the renewal period under the Modification was meant to be 90 percent of fair market value (with CPI increases to

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[1] Zilber may have added Section 22.6 so the Modification would clearly comport with item 3 of Morgan's letter to Ng, which read: "To further clarify the rental rate, in years 6-10, the breakpoint of the percentage rent will be adjusted by the same CPI indicator as the base rental rate. The same terms shall apply in years 11-20 should the Tenant exercise the option to renew the lease."

follow). This interpretation ties in with Modification Section 22.4, Haramis argues, because Modification Section 22.4 discusses a CPI increase only with respect to the second and ensuing years of the renewal term. Pejiu counters that Modification Section 22.2 plainly states the base rent for the first year of the renewal period is to be determined "as set forth in paragraph[] 22.4," which describes the bracketed CPI adjustment, and therefore the parties intended the base rent for the first year of the renewal period to be calculated by adjusting the tenth year's base rent by the bracketed CPI. The reference to "Section 22.3" in the Modification, Pejiu argues, was a drafting or clerical error and should have referred to "Section 22.4."

4. *Assignment of Lease to Respondent*

The Lease was assigned from Pejiu Wu, Inc. to Pacific Restaurant Partners, L.P. Betelnut thereafter opened for business.

C. *Haramis' Acquisition of The Premises And Pejiu's Exercise of Its Option*

In February 1996, Haramis and his wife purchased the building at 2030 Union Street from CKJ. Haramis received a copy of the Lease and the Modification.

1. *Pejiu's Exercise of Its 10-Year Renewal Option*

After operating Betelnut for years in the building owned by Haramis, respondent Pacific Pejiu Wu Restaurant Partners, L.P. (Pejiu) exercised its 10-year renewal option by letter dated November 15, 2004. The letter stated: "Pursuant to Section 22.1 of the Lease, as amended pursuant to the Modification of Lease dated June 6, 1995, Betelnut does hereby exercise its option to renew the Lease for an additional ten (10) year period."

Upon receipt of the November 2004 letter, Haramis reviewed the Lease and Modification, but he did not give any thought as to whether he had to do anything in response to his tenant's exercise of the option.

2. *Haramis' Determination Notice*

About six months later – at the end of May 2005 – Haramis hired a lawyer, Benjamin Kaplan (Kaplan).

On June 15, 2005, 15 days before the start of the 10-year renewal term, Haramis wrote to Pejiu Wu, Inc., as General Partner of Pejiu. Haramis stated: "In reference to

your letter dated November 15, 2004, this letter is 'Landlord's Determination Notice' pursuant to Sections 22.2 and 22.3 of the Lease." Haramis then asserted that the monthly base rent for the first year of the renewal term would be $24,000 per month, which he contends in his opening brief to be "90% of market rate." Haramis also set forth a lower renewal Breakpoint, even though Modification Section 22.6 required bracketed CPI increases to the Breakpoint.[2]

Aside from the effect of the Breakpoint on the Percentage Rent, Haramis contends the base rent stated in the Landlord's Determination Notice would have been nearly $1.3 million more than Pejiu's calculation of the base rent over the renewal term.

Haramis' letter directed Higgins and Upson to address any communications concerning the Landlord's Determination Notice to his attorney, Kaplan. Less than two weeks later, Pejiu sued Haramis.

D. *The Litigation*

1. *Pejiu's Complaint Against Haramis*

Pejiu's complaint against Haramis sought reformation of the Modification and declaratory relief. Pejiu asserted that the parties had intended the base rent for the first year of the renewal period to be calculated by adjusting the previous year's rent by the bracketed CPI, and that reformation was necessary because the Modification did not unambiguously reflect that intent. Pejiu further sought a judicial declaration that the Renewal Term Base Rent under the Modification was to be calculated by the bracketed CPI adjustment, and the untimeliness of Haramis' Determination Notice precluded him from obtaining a rent based on 90 percent of the fair market rate, even if Section 22.3 applied. Pejiu filed a first amended complaint to the same effect in July 2005.

Haramis demurred to and moved to strike the reformation cause of action of the first amended complaint, on the grounds that the claim was time-barred and reformation

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[2] Haramis wrote: "The Base Rent for the first lease year of the Renewal Term is $24,000.00. For the second through and including the tenth year of the Renewal Term, the rent shall be increased pursuant to Section 22.4 of the Lease. The Percentage Rent shall be calculated pursuant to 3.2 (a) through (e) of the Lease. The Renewal Breakpoint for the Renewal Term shall be $1,000,000.00." (Italics omitted.)

is unavailable against a bona fide purchaser for value. (Civ. Code, § 3399.) The demurrer was sustained with leave to amend, and the motion to strike was granted.

Pejiu's second amended complaint for declaratory relief, omitting the reformation claim, asserted that the Modification should be interpreted such that the renewal term base rent would be the last rent plus a bracketed CPI adjustment. Pejiu sought a declaratory judgment that Haramis had no right to serve the Determination Notice, because the Modification had eliminated the 90 percent fair market rate method from Section 22.2, substituting the bracketed CPI adjustment referenced in Section 22.4. Pejiu also sought a declaratory judgment that, assuming Haramis would have had a right to serve a Determination Notice and obtain rent at 90 percent of fair market rate, he waived it by failing to serve the Determination Notice in a timely manner.

2. *Haramis' Cross-Complaint*

Haramis filed a cross-complaint seeking a declaratory judgment that his Determination Notice was effective and he was entitled to set the renewal term base rent at 90 percent of the prevailing fair market rate. In addition, he sought damages, alleging that Pejiu breached the lease by altering the premises without his consent, failing to maintain the premises, and committing other lease violations.

Pejiu moved for summary adjudication on Haramis' cross-complaint. The motion was denied. Pejiu then sought a writ of mandate from this court, which we denied in appellate proceeding number A118551.

3. *Discovery*

Haramis and his attorney, Kaplan, were sanctioned four times for discovery abuses. Haramis contends that Kaplan later complied with these orders and paid the sanctions before trial.

4. *Trial*

A bench trial was conducted in three phases. Phase One dealt with the interpretation of the Lease and the Modification in regard to the base rent for the first year of the renewal period. Phase Two addressed whether Haramis waived his right to have renewal term base rent calculated pursuant to Section 22.3 by failing to serve the

Determination Notice within the time specified in the Lease. Phase Three pertained to Haramis' cross-complaint for damages based on Pejiu's alleged defaults under the Lease.

5. *Statement of Decision*

In its statement of decision, the court found in Pejiu's favor on all phases.

As to Phase One issues, the court found that the Renewal Term Base Rent was to be calculated using the bracketed CPI adjustment method. The court began its analysis with the conclusion that the terms of the Lease and the Modification differed in regard to the renewal option: Lease Section 22.1 provided for two five-year options, while Modification Section 22.1 provides for a single 10-year option; and Lease Section 22.2 provided that the base rent for the first year of each renewal term would be 90 percent of the fair market rate determined by an appraisal proceeding under Lease Section 22.3, while Modification Section 22.2 provides that the base rent for the first year of the single 10-year renewal term shall be determined as set forth in Section 22.4, which provides for a bracketed CPI increase. In addition, Lease Section 3.2 provided that the Breakpoint would increase by the increase in the CPI, while the Modification provides that the Breakpoint would increase by the *bracketed* CPI increase. Concluding that these conflicting provisions cannot co-exist, the court found that Article 22 of the Modification replaced Article 22 of the Lease in its entirety.

Section 22.2 of the Modification provided that the Renewal Term Base Rent – the base rent for the first year of the renewal term – was to be determined as set forth in Section 22.4; because Section 22.4 referred to the CPI adjustment process, the court ruled that the base rent for the first year of the renewal term was also to be determined by that process. The reference in Section 22.6 of the Modification to "Section 22.3" was clearly inadvertent, the court found, and was meant to refer instead to Section 22.4, since the Modification did not contain a Section 22.3 or any reference to the calculation of renewal term base rent as 90 percent of fair market rate, to which Section 22.3 in the Lease had referred.

In addition, the court found that the Lease and Modification were reasonably susceptible to Pejiu's interpretation, and that extrinsic evidence supporting this

interpretation was admissible. The court ruled that the uncontradicted evidence established that the parties to the negotiation of the Modification intended the interpretation now urged by Pejiu.

As to Phase Two, the court ruled that, even if Section 22.3 *had* governed the determination of the renewal term base rent under the Modification, the Determination Notice was not effective, because Haramis failed to timely serve it.

In Phase Three, the court ruled that Haramis had waived any defaults of Pejiu by accepting Pejiu's exercise of its option to renew the Lease.

As a separate ground for the court's decision as to all phases, the court imposed a terminating sanction against Haramis, striking his answer to Pejiu's second amended complaint and dismissing his cross-complaint. The court found that Haramis had testified falsely at trial, falsely verified responses to discovery, submitted false deposition "corrections" drafted by his lawyer, and falsely claimed those changes as his own. The court further found that a terminating sanction was the only means of addressing the "egregious, pervasive misconduct" to assure Pejiu a fair trial.

6. *Judgment*

In August 2008, the court entered judgment in favor of Pejiu, awarding Pejiu, as the prevailing party, "attorneys' fees, costs and expenses pursuant to a memorandum of costs with interest thereon at the rate of ten percent (10%) per annum from the date of the entry of this Judgment until paid."

Haramis filed a notice of appeal from the judgment on October 20, 2008. (Appeal number A123117.)

7. *Costs*

Meanwhile, on September 5, 2008, Pejiu filed a memorandum of costs, seeking costs of $52,768.84.

By written order dated November 5, 2008, the court denied Haramis' motion to tax costs and directed the court clerk to "enter the full amount of Plaintiff's Memorandum of Costs on the August 22, 2008 Judgment, *nunc pro tunc*, pursuant to [Code Civ. Proc.] § 685.090."

Haramis filed a notice of appeal from this order on January 2, 2009. (Appeal number A123918.)

8. *Attorney Fees*

Pejiu also filed a motion to recover over $2.5 million for its attorney fees. By order dated January 6, 2009, the court awarded Pejiu $1,798,105 in attorney fees "[p]ursuant to this Court's August 22, 2008 Judgment" and Civil Code section 1717.

Haramis appealed from this order on March 3, 2009. (Appeal number A124430.)

E. *Consolidation of Appeals*

We granted Haramis' motion to consolidate appeal numbers A123117, A123918, and A124430.[3]

II. DISCUSSION

As mentioned, Haramis attacks the judgment and subsequent cost award and attorney fees award on a number of fronts. As to the judgment, he contends: (1) the trial court misconstrued the Modification to require the determination of base rent for the first year of the renewal term using the bracketed CPI adjustment method rather than the 90 percent of fair market rate method, and improperly permitted parol evidence on this issue; (2) Haramis' late service of the Landlord's Determination Notice did not waive his right to the renewal term base rent specified in the Lease; (3) Haramis did not forfeit his right to recover damages for Pejiu's breaches of the Lease by accepting Pejiu's exercise of its option to renew; and (4) imposition of a terminating sanction, as an alternative basis for the judgment, was unfair and without adequate evidentiary support. He further contends that the cost and fee awards should not have been entered nunc pro tunc to the date of the entry of judgment, and, more broadly, interest should not begin to accrue on the cost and fee awards as of the date of the entry of judgment. We address each of the issues in turn.

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[3] Haramis' trial counsel filed a notice of election to proceed by appendix. Pejiu filed a motion to strike the election as untimely, which the trial court granted. In appellate proceeding number A123753, we issued a writ of mandate setting aside the trial court's order.

A. *Interpretation of the Lease and Modification as to Renewal Term Base Rent*

It is undisputed that, under Section 22.2 of the original Lease, the base rent in the first year of each renewal term afforded by the Lease was to be 90 percent of the prevailing fair market rate for the premises. If the Modification did not change the terms of the Lease in that regard, the procedure for determining 90 percent of the fair market rate under Section 22.3 applied, and Haramis was authorized under Section 22.3 to serve a Landlord's Determination Notice. The questions presented by the parties, therefore, are (1) whether the Modification changed the means of determining the base rent in the first year of the renewal term afforded by the Modification, and (2) whether Haramis in any event waived his right to serve his Landlord's Determination Notice (and to obtain rent at 90 percent of the fair market rate) by failing to serve the notice in a timely manner. In this section of our opinion, we consider the interpretation of the Modification.

The applicable principles of contractual interpretation are familiar. We "give effect to the mutual intention of the parties as it existed at the time of contracting," to the extent it is ascertainable and lawful. (Civ. Code, § 1636.) "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638.) Indeed, when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing, if possible. (Civ. Code, § 1639.) We therefore first turn to the language of the Modification.[4]

1. *Plain Meaning of the Modification*

The Modification purports to modify Article 22 of the Lease, pertaining to the option renewal period, by setting forth new Sections 22.1, 22.2, 22.4 and a new Section 22.6. Obviously, Modification Sections 22.1, 22.2, and 22.4 supplant Lease

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[4] Where extrinsic evidence has been properly admitted as an aid in interpreting a written contract, and there is a conflict in the extrinsic evidence, we review the trial court's ruling for substantial evidence. (*Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865-866 & fn. 2.) In the matter before us, however, there is no conflict in the extrinsic evidence. Nor does Haramis focus on the credibility of the extrinsic evidence, as opposed to its admissibility and content. We therefore review the trial court's interpretation of the Lease and Modification de novo. (*Ibid*.) We would reach the same result if we were to review for substantial evidence.

Sections 22.1, 22.2 and 22.4. The Modification does not expressly state whether the omission of a Section 22.3 and Section 22.5 means that Lease 22.3 and Lease 22.5 are deleted or of no further effect, or whether (as Haramis insists) they should remain effective. To answer that question, we must begin with Sections 22.1, 22.2, and 22.4, as well as 22.6.[5]

Modification Section 22.1 provides that the Tenant shall have one 10-year renewal option. Modification Section 22.2 provides that the base rent for this renewal term would be "determined as set forth in paragraph[] 22.4." Section (or paragraph) 22.4 in turn provides that the base rent shall be increased in years *12* through 20 by the bracketed increase in the CPI. Although Modification Section 22.4 does not by its own terms expressly apply the bracketed CPI adjustment to year 11 (the first year of the renewal period), the reference in Section 22.2 to Section 22.4 is reasonably read to apply the bracketed CPI adjustment process of Section 22.4 to the first year of the renewal term as well.

This interpretation is compelled for a number of reasons. First, the conclusion that the negotiating parties intended the CPI adjustment methodology to apply in year 11 is virtually inescapable in light of their changes to Section 22.2. Lease Section 22.2 had instructed that the base rent for the first year of the renewal term would be 90 percent of the prevailing fair market rate; Modification Section 22.2 *takes out* that language and provides that the base rent for the first year of the renewal term shall instead be "determined as set forth in paragraphs 22.4." Modification Section 22.2 also *omits* all the other language in Lease Section 22.2 that had defined "fair market rate." Whatever the parties intended by these changes, it certainly was not to continue the fair market rate measure that they *deleted*.

Stated a bit differently, if as Haramis contends the contracting parties had intended the first year of the renewal term to have a base rent of 90 percent of fair market rate, they would have carried over that language from Lease Section 22.2 into Modification

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[5] The Lease and Modification refer to sections, such as "Section 22.2," rather than paragraphs, except that Modification Section 22.2 refers to "paragraphs 22.4."

Section 22.2. There is no reason to expressly omit the fair market rate language from Modification Section 22.2 if in fact the parties had intended to use the fair market rate determination.

Second, there is no reason for Section 22.2 to refer to Section 22.4, except to apply the CPI adjustment method referenced in Section 22.4 to the first year of the renewal term. Section 22.2 provides that the Renewal Term Base Rent shall be "determined" as set forth in Section 22.4, and Section 22.4 has two key subparts: (1) "The Base Rent for the first Lease Year of the Renewal Term shall be the Renewal Term Base Rent" and (2) "On the first day of the Second Lease Year of the Renewal Term thereafter . . . the Renewal Term Base Rent shall be adjusted by" the bracketed CPI. The first subpart of Section 22.4 merely confirms that the base rent for the first year of the renewal term is what is defined in Section 22.2 as being determined by Section 22.4 (the "Renewal Term Base Rent"), and does not set forth *how* this rent would be "determined." Section 22.2 must therefore refer to the rent measure expressed in the second subpart of Section 22.4, which mentions the CPI adjustment methodology. Moreover, since Section 22.4 by its *own* terms applied the CPI adjustment to years 12-20, the mention of Section 22.4 in Section 22.2 must have been intended to apply the CPI adjustment methodology of Section 22.4 to something *other* than years 12-20 – namely, year 11, the first year in the renewal term.

Third, the conclusion that the contracting parties intended to use the bracketed CPI adjustment to arrive at the base rent for year 11 is consistent with the Modification's omission of any Section 22.3 or 22.5. Because the parties intended in the Modification for the initial base rent in the renewal term to be calculated using the bracketed CPI adjustment, there was no longer any need for Section 22.3, which had set forth the procedure for determining 90 percent of fair market value. Nor was there any need for Section 22.5, which had provided that the base rent would not be less than the base rent of the month immediately preceding the commencement of the renewal term: since the

rent was going to be increased over the prior year's base rent by four to eight percent – the bracketed CPI – it would never be less than the prior year's base rent.[6]

We must also consider Modification Section 22.6, which reads in part: "At the same time and manner as the Renewal Term Base Rent is determined under *Section 22.3*, the new Breakpoint for the Renewal Term ('Renewal Breakpoint') shall be established." (Italics added.) As mentioned, there is no "Section 22.3" in the Modification, so the reference to Section 22.3 must be either (as Pejiu urges) an error, or (as Haramis urges) an allusion to *Lease* Section 22.3, which dictated how the parties would arrive at a base rent of 90 percent of fair market rate value.

The plain meaning of the language in the Modification, and the Lease and Modification taken as a whole, precludes Haramis' interpretation. To conclude that Modification Section 22.6 refers to Lease Section 22.3, which contains the procedure for determining 90 percent of fair market value, would be inconsistent with Modification Section 22.*2*, which expressly requires base rent to be determined as set forth in Modification Section 22.4 (the CPI adjustment) *instead of* 90 percent of fair market rate.

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[6] The court found that the Modification's change to Section 3.2(b) also supports the conclusion that the contracting parties intended the CPI adjustment method to govern the calculation of base rent for the first year of the renewal period. Section 3.2(b) of the Lease provided that in "each and every subsequent Lease Year during the Term of this Lease, the Breakpoint shall be adjusted by [the CPI adjustment]." Section 3.2(b) of the Modification provides that in "each and every subsequent Lease Year during the Term of this Lease, the Breakpoint shall be adjusted by *the same CPI indicator as the Base Rent under section 3.1*." (Italics added.) The "Term" of the Lease, as defined in the Lease and the Modification, is the 10-year initial term "unless extended pursuant to Article 22 of this Lease." Thus, under the Modification, the Breakpoint would be adjusted for CPI in the 11th year by the same indicator as the Base Rent under section 3.1. Pejiu urges that this indicates the CPI adjustment method was to apply to the base rent calculation in the 11th year of the Lease. Haramis counters that "Lease Year of this Lease" must refer only to the lease years in the initial 10-year term, because otherwise Zilber would not have felt the need to state in Modification Section 22.6 that the CPI adjustment method applies to the Breakpoint in years 12-20. We need not resolve this debate to conclude that the Modification applies the CPI adjustment method to the calculation of the base rent for the first year of the renewal period.

Concluding that Modification Section 22.6 refers to Lease Section 22.3 would therefore ignore the clear and obvious intent of the parties.[7]

The logical conclusion is that Modification Section 22.6's reference to "Section 22.*3*" was meant to be a reference to Modification Section 22.*4*. This renders Section 22.6 consistent with Modification Section 22.2, which refers to Section 22.4 as well. (See *McNeil v. Graner* (1949) 91 Cal.App.2d 858, 863-864 [notwithstanding absence of extrinsic evidence or request for reformation, the word "of" was a typographical error, and the word "or" was intended, in light of the obvious purpose of the contractual provision].)[8]

For the foregoing reasons, we conclude that the plain meaning of the Modification is that the base rent for the first year of the renewal term is to be calculated by adjusting the prior year's base rent by the bracketed CPI.

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[7] It would also be unreasonable to conclude that the reference in Section 22.2 to "paragraphs 22.4" was intended to refer to Section 22.*3* of the Lease. Again, if the contracting parties had intended the base rent for the first year in the renewal term to be 90 percent of fair market rate, they would not have omitted that language from Section 22.2 of the Modification.

[8] The trial court resolved the reference in Modification Section 22.6 to "Section 22.3" as follows: "Taken in context with the other provisions in the Modification, the reference in Paragraph 22.6 to '22.3' was clearly inadvertent; it could only have been meant to refer to '22.4.' The two references cannot be harmonized; the Renewal Term Base Rent cannot be determined both by the 90 [percent] fair market rate adjustment per Paragraph 22.2 in the Lease and 'as set forth in Paragraph 22.4' of the subsequent Modification." Haramis disagrees with the trial court's conclusion, arguing that Zilber, who drafted Modification Section 22.6, did not testify that he made any mistake in referring to Section 22.3 or intended the reference to mean some section other than Section 22.3. The trial court, however, based this particular conclusion on the plain meaning of the Modification's language, without resort to the extrinsic evidence of Zilber's testimony – as do we. In any event, Zilber testified at trial that he did not remember why he referred to Section 22.3 (in his notes, from which Modification Section 22.3 derived). Because Zilber's testimony does not compel a conclusion contrary to the construction at which the trial court arrived, Haramis fails to establish error on this ground.

2. *Extrinsic Evidence*

Because the Lease and Modification are reasonably susceptible of Pejiu's contention that Section 22.2 was intended to apply the bracketed CPI adjustment method to calculate the base rent for the first year of the renewal period, it was not erroneous for the trial court to admit and consider extrinsic evidence supporting Pejiu's interpretation. (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912-913.) Or, to put it slightly differently, even if the phrase "determined as set forth in paragraph[] 22.4" in Modification Section 22.2 was reasonably subject to *both* Haramis' construction as well as Pejiu's construction, extrinsic evidence may be considered to ascertain the intent of the contracting parties. (*Ibid*.)

After considering the extrinsic evidence, the trial court ruled: "The Court finds that Paragraph 22.2 of the Modification is reasonably susceptible to Plaintiff's interpretation. The language 'the Renewal Term Base Rent . . . shall be determined as set forth in Paragraph 22.4' means that the Renewal Term Base Rent shall be determined by the bracketed CPI increases of Paragraph 22.4." The court found: "Upson insisted that the two 5-year renewal options be replaced with a single 10-year renewal option, *and that the 90% market rate adjustment in the renewal term be replaced by a CPI increase within a 4% to 8% bracket*. Upson's testimony was credible and uncontradicted." (Italics added.)

We agree with the trial court that this is a reasonable inference from Upson's testimony. Upson testified that there were some troublesome business points in the Lease that "needed to be discussed" with CKJ. The major ones "were the option periods[:] the two five year periods with *their* 90 percent market adjustment. That was the biggest single issue in that we couldn't budget *past ten years* with a known rent. . . ." (Italics added.) Upson explained his view in the following discourse at trial: "Q. Addressing the first point you mentioned the two five year options, what was troublesome to you about that provision? [¶] A. The two five year options because *they* were tied to a market adjustment pretty much meant that those options were of no value to us because we did not know what the rent was going to be at the beginning of those *two* five year

periods, couldn't budget for it. [¶] Q. Was the five year – wholly apart from the – what the rent would be in the option period, was a five year – two five year options acceptable standing by itself? [¶] A. If it didn't have a 90 percent adjustment? [¶] Q. Yes. [¶] A. Yes. Without the 90 percent adjustment, the *two* five year periods would have been fine as long as *they* had what we eventually asked for[:] a CPI increase applied to us so we could plan for it. [¶] Q. Please tell us what was wrong or unacceptable to you of a 90 percent market rate adjustment *at the start of* the five year – *the first five year option period* in Exhibit five? [¶] A. Well, the restaurant particularly for the size and number of seats was so small and investment was so large we would not have had an opportunity to get a return of our initial capital cash flow month to month and return a proper return to the limited partners we were going to." (Italics added.) From this it is clear that Upson did not want the base rent for the first year of *any* renewal term to be determined by reference to market rate, but only by CPI adjustment from the prior year.

Zilber's testimony also supported Pejiu's interpretation. As the court explained in its statement of decision: "in response to the Court's question whether Modification Paragraphs 22.2 and 22.4 incorporated Paragraph 8 of Exhibit 18 [i.e. the portion of the letter from Morgan to CKJ that states the two five-year renewal periods would be replaced by one ten-year renewal period at the same terms as the base lease with rental increases based on the bracketed CPI adjustment] and specifically the issue of the rent for the first year of the renewal term, Zilber said 'I have no specific recollection whether I dealt with the first year of the lease renewal term. *I thought the two clauses [22.2 and 22.4] made it clear that's how it would apply*.'" The reasonable inference from this testimony is that Zilber understood that the reference in Section 22.2 to Section 22.4 was applying the CPI-adjustment method to the determination of the base rent for the first year of the renewal period.

Haramis contends there was no evidence that Upson ever told *the owner* CKJ, or anyone on CKJ's behalf or even Upson's own real estate agent, that he wanted to replace the 90 percent market rate method with the CPI adjustment method for the first year of the renewal term. We disagree.

There was, indeed, at least circumstantial evidence supporting that very inference. Upson testified that the replacement of the market rate methodology with a CPI adjustment method was his primary concern, that he would not have participated with Chen in his restaurant venture unless the lease were changed, and that he told Chen what he had decided. Furthermore, he testified that he discussed with Chen and Higgins having their agent, Morgan, prepare a letter "representing our thoughts and adjustments to the lease," which Morgan "would transmit to the landlord's representative John Ng." Morgan's letter to Ng confirmed that the Lease would be changed by replacing the two five-year options with one ten-year option "at the same terms as the base lease with rental increases based on CPI with a minimum of 4% and a maximum of 8%." A copy of the letter was sent to CKJ, and Ng discussed with CKJ the issues raised in the negotiations. Ng responded in writing that CKJ agreed with the proposed change, and CKJ's principals indicated by their signature that they had "read, received, underst[ood] and approve[d]" Ng's letter. Moreover, Upson testified that even the two five-year options would have been acceptable to him "as long as they had *what we eventually asked for*[:] a CPI increase applied to us so we could plan for it." (Italics added.) This evidence, along with the obviously different language of the Modification that CKJ signed, gives rise to the inference that CKJ knew and understood Upson's desire to replace the market rate method with the CPI adjustment method for the first year of any renewal term, and that CKJ had a mutual intent in this regard.[9]

Haramis further argues that Pejiu's (and the court's) interpretation is "absurd" because there was no rational reason for Upson to insist upon a change from two five-year options to a single 10-year option if the Renewal Term Base Rent was last rent plus a CPI adjustment, while there would be if the Renewal Term Base Rent was 90 percent of market rate because it would avoid a second "bump" of base rent to 90 percent of fair

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[9] In addition, CKJ's "Revised Marketing Statement" of June 14, 1995 – after the Modification was signed – provided that the lease included "percentage rents as well as fixed increases," and Ng testified that he did not understand a prevailing rate reappraisal to be a "fixed increase[]."

market rate in year 16. (In other words, Upson's willingness to have one 10-year option and give up the advantages of two five-year options indicates his understanding that that was the only way to get rid of the "bump" at year 16, which suggests he did not think the "bump" at year 16 – *or* the bump at year 11 – was otherwise removed by the Modification, and thus he could not have thought that the Modification required a CPI adjustment to be used to set the base rent for the first year of the renewal term.) Haramis' argument is without merit.

In the first place, Haramis ignores Upson's testimony that the two five-year options were not a problem so long as the 90 percent market rate adjustment was replaced, and that Upson was concerned with the 90 percent market rate adjustment in *both* of the original renewal terms (i.e. years *11* as well as 16). We (and the trial court) may rely upon this testimony to conclude that, by modifying the Lease, Upson intended to reduce his vulnerability to market rent conditions in San Francisco if the Lease were renewed, and Upson's effort to create one renewal term was clearly secondary to his attempt to substitute the bracketed CPI method of calculating rent for each year in the renewal term.

Furthermore, Upson's proposal for a 10-year option cannot be viewed in isolation. The Modification changed a great many terms of the Lease, and Upson's offer to have one 10-year option could simply have been a concession to entice the landlord into accepting the new terms he desired, including a change from a fair market rate determination to a CPI adjustment. Upson's willingness to give up two five-year options for one 10-year option does not preclude the finding that the Modification, in fact and in law, provides that the base rent for the first year of the renewal term was to be determined by a CPI adjustment.

Haramis' argument also ignores the circumstances in which the Modification was negotiated, which supports Upson's reasonable desire to avoid the *first* "bump" in year 11. The Modification was signed in June 1995, providing for an initial 10-year term commencing in July 1995. Pejiu's decision whether to exercise its option to renew would therefore not occur until approximately January 1, 2005 – over nine years later. To

determine whether to invest in the Betelnut venture in light of the upfront capital expenditures, Upson had to make sure there would not be an extreme, or unpredictably extreme, increase in the rent at the *commencement* of the renewal term, some nine years after Pejiu signed the Modification. Avoiding the "bump" in base rent at year 11 was therefore extremely important, and it is reasonable to infer he intended to get rid of that first "bump" by changing to a CPI adjustment method. Moreover, avoiding two "bumps" – at the 11th year and at the 16th – would be better than avoiding just one "bump." Indeed, as shown *ante*, Upson testified on this very point.

In sum, Haramis presented no testimony or other extrinsic evidence showing that the contracting parties intended the Modification to require base rent in the first year of the renewal period to equal 90 percent of fair market rate. The extrinsic evidence, as well as the language of the Lease and Modification, compel the conclusion that the parties intended the base rent in the first year of the renewal period under the Modification to be calculated by adjusting the base rent in year 10 by the bracketed CPI.

3. *Haramis' Remaining Contentions Lack Merit*

As stated, Haramis contends the base rent for the first year of the renewal term must be calculated at 90 percent of fair market rate, because Section 22.4 mentions CPI increases only with respect to the second and later years of the renewal term, and Modification Section 22.6 in his view refers to Lease Section 22.3. For the reasons discussed *ante*, Haramis' analysis is contrary to the parties' removal of all reference to fair market rate in Modification Section 22.2, the language of the Modification and Lease as a whole, and the extrinsic evidence produced at trial.

Haramis' subsidiary arguments have no merit either. We have considered all of them, and we find them all unpersuasive. We address in this opinion the arguments he primarily sets forth.

a. *Modification or Deletion of Article 22*

Haramis posits a number of arguments for the proposition that the Modification did not delete or render ineffective Lease Sections 22.3 and 22.5. In the totality of the language of the Modification and the extrinsic evidence, these arguments are meritless.

For example, Haramis debates the trial court's conclusion that Article 22 of the Lease was deleted in its entirety, and replaced by the paragraphs set forth in the Modification, because the Modification used the word "deleted" when it deleted other provisions from the Lease but employed the word "modified" in describing the change to Article 22. The trial court's conclusion is not indispensable to the judgment, and in any event we disagree with Haramis' argument.

In the first place, while the Modification states that it "modifie[d]" Article 22, the elimination of Sections 22.3 and 22.5 from Article 22 *is* a modification of Article 22. There is, therefore, no inconsistency between the word "modified" and our conclusion that the Modification did not incorporate, even implicitly, Sections 22.3 and 22.5 of the Lease.

To be sure, the language of the Modification is not always consistent in its characterization of modifications and deletions. With respect to Articles 1 and 2 (pertaining to the definition of the premises and the term of the Lease), the Modification provides that the articles are "deleted" and "the following [sections] inserted in its place." With respect to Article 3, the Modification states that it is "modified by adding the following," and then specifies certain language to be added "at the end of Section 3.2(b)" and that a new Section 3.6 is being "[a]dd[ed]." With respect to Article 22, the Modification provides that the article "is modified as follows" and then sets forth Sections 22.1, 22.2, 22.4, and 22.6. Unlike the Modification's treatment of Articles 1 and 2, it does not state that Article 22 is "deleted" with sections inserted in its place. On the other hand, it also does not state that Section 22.6 is to be "[a]dd[ed]," as it does with respect to adding Section 3.6 to existing Article 3. Under the circumstances, the Modification's use of the words "modified" and "deleted" does not provide a clear or reliable gauge for discerning the parties' intent. Certainly it does not compel a conclusion different from the plain meaning of Modification Sections 22.1, 22.2, 22.4, and 22.6 and the evidence admitted at trial.

Next, Haramis contends that Sections 22.3 and 22.5 were incorporated into the Modification because they had not been expressly eliminated. Pejiu responds by pointing

to evidence that the initial draftsperson of the Modification – the Landlord's lawyer Yuen – expressly incorporated a provision when it was going to be effective in the Modification: Lease Section 22.4 was expressly repeated in Modification Section 22.4. While the inclusion of Section 22.4 in the Modification may not be as significant as Pejiu suggests (it could have been included because the reference to "each" renewal term in the Lease had to be changed to "the" renewal term), the parties' intent to remove Sections 22.3 and 22.5 is amply supported by the omission of those sections from the Modification, the construction of the sections that do appear in the Modification, and the extrinsic evidence as explained *ante*.

Lastly, Haramis points out that the Modification states: "Except as modified herein, all of the remaining terms and conditions shall remain in full force and effect." That general provision, however, begs the question of what the Modification has modified. If in fact the reasonable interpretation of the Modification is that Sections 22.3 and 22.5 are deleted from Article 22, then those sections are not "remaining" and thus do *not* "remain in full force and effect." Indeed, since the Modification states that Article 22 *is* "modified," the provision to which Haramis refers actually suggests that Article 22 of the Lease is no longer in effect, leaving only the provisions explicitly set forth in the Modification.

b. *The Language of Section 22.4*

Haramis contends that the conclusion we and the trial court have reached—that Modification Section 22.2 applies the CPI-adjustment procedure of Modification Section 22.4 to year 11 as well as to years 12-20—is expressly refuted by Section 22.4 itself. In particular, Haramis emphasizes, Section 22.4 of the Modification states that "The Base Rent for the *first* Lease Year of the Renewal Term shall be the Renewal Term Base Rent" while the CPI increases in Section 22.4 expressly apply to "the *Second* Lease Year of the Renewal Term" and each year thereafter. (Italics added.) On this basis, Haramis insists that Modification Section 22.4 "specifically rejects" Pejiu's position that the Renewal Term Base Rent in the first year of the renewal term would be set by reference to the CPI.

Haramis is incorrect. Section 22.4 does not specifically state that the base rent for *only* years 12-20 would be determined by a CPI adjustment, or that under no circumstances could the base rent for the first year of the renewal term be determined by a CPI adjustment. It merely provides that the base rent for the first year of the renewal term would be the "Renewal Term Base Rent," which Section 22.2 states shall be "determined as set forth in paragraphs 22.4." As explained *ante*, the reasonable meaning of these cross-references, in light of the language of the parties' agreement and the extrinsic evidence, is that the renewal term base rent is to be determined by the CPI adjustment method referenced in Section 22.4.[10]

c. *Admission of Extrinsic Evidence*

Haramis argues that parol evidence is admissible only to provide a reasonable meaning to specified ambiguous words of a contract, and cannot be used to insert words that are not there. He further protests that extrinsic evidence cannot be used to show that the words "Second Year" in Section 22.4 really mean "First Year." In the matter before us, however, extrinsic evidence is not used to insert words that are not in the Modification, or to change "Second Year" in Section 22.4 to "First Year." Rather, extrinsic evidence provides (and confirms) a reasonable meaning to the express reference in *Section 22.2* to "paragraphs 22.4." Simply put, extrinsic evidence is being used to interpret Section 22.2, not to change the words in Section 22.4.

Haramis additionally argues that parol evidence is inadmissible because the Modification incorporates the integration clause contained in Section 28.5 of the Lease. He argues that an integration clause is conclusive on the issue of integration, so that parol evidence is inadmissible to show that the parties did not intend the writing to constitute

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[10] Haramis asserts, "Inclusio unius est exclusio alterius." In English, that means to include one thing is to exclude the alternative. However, Section 22.4's application of the CPI adjustment method to the second and successive years of the renewal term does not preclude application of the CPI adjustment method to the first year of the renewal term, given the language of the Modification as a whole. The principle on which Haramis relies cannot be invoked, in any language, to foist upon a contracting party a meaning that was never intended.

their sole agreement. Here, however, extrinsic evidence is not admitted on the issue of integration, but on the issue of the meaning of Section 22.2. (See *Morey, supra,* 64 Cal.App.4th at p. 913, fn. 4.)

d. *Rules of Interpretation*

Lastly, Haramis argues that any uncertain language in the Modification should be interpreted against Pejiu because Pejiu's lawyer, Zilber, had the last shot at drafting the Modification. (Civ. Code, § 1654.) Pejiu counters that every word of the Modification's Article 22 that the trial court addressed, including the Article's omissions of Sections 22.3 and 22.5, was authored by Yuen (CKJ's attorney), except for paragraph 22.6, which was authored by Zilber. At the very least, the evidence shows that the Modification was a negotiated agreement. Haramis' argument is misplaced.

In the final analysis, as a matter of both the language of the Modification and the extrinsic evidence adduced at trial, the Modification requires the base rent for the first year in the renewal period to be determined by the bracketed CPI adjustment method. The court did not err in Phase One.[11]

B. *Waiver by Late Service of the Determination Notice*

As to the Phase Two issues, the court ruled that, even if the base rent for the first year of the renewal term was to be determined at 90 percent of the fair market rate under Lease Section 22.3, Haramis waived his right to receive that amount by sending the Landlord's Determination Notice late. Haramis contends this ruling was erroneous.

Because we have concluded *ante* that the Renewal Term Base Rent for Pejiu's renewal term was *not* to be 90 percent of fair market rate, and Lease Section 22.3 did *not* apply to Pejiu's renewal term, the efficacy of Haramis' Determination Notice need not be further considered. We need not and do not decide whether the trial court erred in this regard.

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[11] Haramis suggests the trial court decided to read the Modification in Pejiu's favor, and then found ways to justify its desired result. Our review of the record indicates, however, that the trial court undertook a careful analysis of the issues before it. While we do not agree with all of the trial court's conclusions as explained *post*, Haramis' insinuations are unwarranted and unhelpful.

C. *Haramis' Cross-Complaint*

In its trial brief, Pejiu asserted that Haramis could not recover damages for Pejiu's alleged breaches of the Lease, because (1) Haramis waived Pejiu's alleged defaults by accepting Pejiu's exercise of the option to renew, and (2) Haramis failed to give Pejiu notice of the defaults and opportunity to cure them. In its statement of decision, the trial court agreed with Pejiu on the first of these arguments and did not discuss the second. We address each of them in turn.

1. *Waiver of Defaults by Acceptance of Exercise of Option to Renew*

Section 22.1 of the Modification provides: "The Renewal portion shall be effective only if Tenant is not then in *default* under any of the terms or conditions of this Lease . . .." (Italics added.) The Lease defines a "default" to include "any failure to perform or comply with any covenant or condition of this Lease . . .." Pejiu argued, and the trial court agreed, that Haramis could not maintain his cross-claim for Pejiu's alleged breaches of the Lease, because Haramis waived his right to seek damages for those breaches by accepting Pejiu's exercise of its option to renew. (It is undisputed that Haramis knew of the alleged breaches before accepting the exercise of the option.)

We question the trial court's ruling on this point. Section 22.1 of the Modification permits the Landlord to reject the Tenant's exercise of its option to renew – in other words, to declare ineffective the "Renewal portion" – if the Tenant is in default. By treating Pejiu's exercise of the option as effective, Haramis relinquished his right to use the default as a basis *for rejecting the option*.

That does not mean, however, that Haramis also waived his right to obtain a remedy for Pejiu's breaches. The Lease and Modification do not specify any such waiver. Nor is it reasonable to construe the Lease or Modification as putting the Landlord in the quandary of having to decide whether to accept the exercise of the option or to be able to pursue the Tenant for damages for the breach. Furthermore, there is no evidence that Haramis intended to relinquish his right to pursue Pejiu for damages for its alleged breaches of the Lease, merely by accepting Pejiu's exercise of the option. Nor

can it be said that Haramis' acceptance of Pejiu's exercise of the option prejudiced Pejiu in defending against the claims for breach.

Pejiu relies on *Leiter v. Eltinge* (1966) 246 Cal.App.2d 306, and *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526. Neither case is on point. In *Leiter*, the plaintiff's acceptance of another party's late tender of performance waived the plaintiff's right to rescind the contract for material breach or hold the other party liable for damages. (*Leiter, supra*, at pp. 311, 317.) In *Salton*, the plaintiff's acceptance of another party's defective performance waived the right to terminate their contract. (*Salton, supra*, at p. 533.) Neither *Leiter* nor *Salton* held that a landlord's acceptance of his tenant's exercise of an option to renew the lease waived his right to obtain damages for the tenant's breach of the lease.

In the end, we need not decide whether the trial court erred in this regard, because the judgment with respect to Haramis' cross-complaint for breach of the Lease is justified on another ground, to which we turn next.

2. *Failure to Give Notice of Default and Opportunity to Cure*

As an alternative basis for upholding the judgment on the cross-complaint, Pejiu asserts, as it did at trial, that Haramis' claims for breach were barred by his failure to provide written notice of default and opportunity to cure the default, as required under Lease Article 15.

Section 15.1 required Haramis to give notice of any default under the Lease, as well as an opportunity to cure the default: "Any abandonment of the Premises or any failure to pay any Rent or Additional Charges as and when due, or *any failure to perform or comply with any covenant or condition of this Lease, shall constitute a default* by Tenant under this Lease. Tenant shall have a period of five (5) days after written notice from Landlord within which to cure any default in the Payment of Rent or Additional Charges. *Tenant shall have a period of thirty (30) days after written notice from Landlord within which to cure* any other default described above in this Section 15.1, unless such default cannot be cured within such thirty (30) day period, in which case Tenant shall have a *reasonable period of time* to cure such default." (Italics added.)

Section 15.2 recited the landlord's remedies once the landlord gave the tenant notice of the default and an opportunity to cure: "Upon the occurrence of a default by Tenant which is *not* cured by Tenant within the applicable grace period, Landlord shall have the following rights and remedies in addition to all other rights to remedies available to Landlord at law or in equity: [¶] (a) The rights and remedies provided by California Civil Code section 1951.2 [pertaining to termination of a lease and recovery of future rents] [¶] (b) The rights and remedies provided by California Civil Code section 1951.4 [pertaining to Landlord's continuing the lease and recovering rent]." (Italics added.)

There is no dispute that Haramis did not give Pejiu the required written notice of default. Pejiu therefore did not receive an opportunity to cure, to which it was entitled under Section 15.1. Under Section 15.2, the provision of such notice and opportunity to cure was a condition precedent to Haramis' right to pursue remedies for the defaults. Because Haramis never satisfied this condition precedent, he could not, as a matter of law, maintain claims for damages based on those defaults.

Haramis argues that, under Section 15.2, the landlord's provision of notice and opportunity to cure is a condition precedent only to the landlord seeking remedies under Civil Code sections 1951.2 and 1951.4. Not so. Section 15.2 entitled the landlord to remedies under Civil Code sections 1951.2 or 1951.4 "*in addition to* all other rights to remedies" the Landlord might have, "upon the occurrence of a default by Tenant which is not cured by Tenant within the applicable grace period." (Italics added.) The obvious point of Section 15.2, therefore, was to clarify the remedies available to the landlord, not to limit the instances in which notice and opportunity to cure would be a condition precedent to the landlord's recovery. Section 15.2 did not expressly provide that only the two Civil Code remedies would be precluded if the landlord failed to give notice of default, and no such interpretation would be reasonable since Section 15.1 requires notice and opportunity to cure for *every* default. Section 15.1 would have little meaning if the landlord could sue the tenant for damages without giving notice and opportunity to cure.

Although the trial court granted judgment as to the cross-complaint on the basis of waiver (by Haramis' acceptance of Pejiu's exercise of the option), we may affirm the

judgment on the ground that Haramis failed to give the required notice and opportunity to cure. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; *Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 906-907.) As mentioned, Pejiu made the notice argument in its trial brief and its respondent's brief in this appeal, and Haramis responded to those arguments in the trial court and in this court. The trial court did not reject Pejiu's argument in its statement of decision, and it did not make any factual finding that would preclude judgment on Haramis' cross-complaint for failure to give notice and an opportunity to cure.[12] Moreover, because Haramis' failure to give notice and opportunity to cure precludes him from obtaining relief on his cross-claim as a matter of law, a remand to the trial court would result in a dismissal of the cross-complaint anyway, this time on the appropriate grounds.[13]

In the final analysis, Haramis has not established that he is entitled to reversal of the judgment on his cross-complaint.

D. *Terminating Sanction*

As explained in its statement of decision, the trial court imposed terminating sanctions against Haramis as an alternative basis for the judgment: "[A]s a separate basis for the Court's decision, it dismisses Haramis' Cross-Complaint and strikes his Answer to Plaintiff's Second Amended Complaint as a terminating sanction for egregious, pervasive misconduct in discovery and at trial as the only sanction which can assure Plaintiff a fair trial." Haramis contends the court erred.

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[12] Another judge had previously denied Pejiu's motion for summary adjudication on the cross-claim, concluding that Section 15.2 limited the notice and cure opportunity required by Section 15.1. On the record before us, the conclusion is incorrect for the reasons we have stated

[13] In addition, as to Haramis' claim of breach for Betelnut's closure for a week in September 2004, the trial court found that the Lease did not require Betelnut to remain open during any particular hours or days. Haramis does not address that ruling and has therefore waived any claim of error in that regard.

Because we affirm the judgment of the trial court on other grounds for the reasons stated *ante*, we need not and do not decide whether the trial court erred in imposing a terminating sanction as an alternative basis for the judgment.

E. *Interest on Post-Judgment Awards of Attorney Fees and Costs*

As drafted by Pejiu, the proposed judgment stated, as relevant here, that Pejiu would recover "its attorneys' fees, costs and expenses in the sum of $_____ with interest thereon at the rate of ten percent (10%) per annum from the date of the entry of this Judgment until paid."

The court crossed out "in the sum of $_____," replaced it with "pursuant to a memorandum of costs," and signed the judgment. The relevant portion of the judgment therefore reads: "Plaintiff, as prevailing party, shall have and recover from Haramis its *attorneys' fees, costs* and expenses pursuant to a memorandum of costs *with interest thereon at the rate of ten percent (10%) per annum from the date of the entry of this Judgment* until paid." (Italics added.) The judgment was entered on August 22, 2008.

On September 5, 2008, Pejiu filed a memorandum of costs, seeking costs of $52,768.84 and indicating that it would seek its attorney fees by motion. (See Code Civ. Proc., § 1033.5, subd. (c)(5); Cal. Rules of Court., rule 3.1702.) At the hearing on Haramis' motion to tax costs – after the judgment had been entered—Haramis objected orally to the cost order being entered "nunc pro tunc" to the date of the judgment. By written order dated November 5, 2008, the court denied Haramis' motion to tax costs and directed the court clerk to "enter the full amount of Plaintiff's Memorandum of Costs on the August 22, 2008 Judgment, *nunc pro tunc*, pursuant to [Code Civ. Proc.] § 685.090."[14]

Pejiu also filed a motion seeking over $2.5 million in attorney fees. By order dated January 6, 2009, the court awarded Pejiu $1,798,105 in attorney fees "[p]ursuant to this Court's August 22, 2008 Judgment" and Civil Code section 1717.

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[14] Code of Civil Procedure section 685.090, subdivision (a)(1), provides that costs are added to and become a part of the judgment "[u]pon the filing of an order allowing the costs pursuant to this chapter."

Haramis complains that, as a result of these orders, he has to pay interest on the costs award, and perhaps the attorney fees award, for several months before the amount of the awards were calculated and the orders were entered. He contends this was error.

The parties debate whether the entry of the cost and attorney fee *orders* should have been dated nunc pro tunc as of the date of the entry of judgment. However, the date of the orders, and whether the orders could be entered nunc pro tunc, is not the real question. The *judgment* required interest to begin accruing on the cost and attorney fee awards as of the date of the judgment, regardless of the dates of the orders awarding the costs and attorney fees. If this aspect of the judgment is not erroneous, the date of the entry of the orders is of no consequence. It is therefore this aspect of the judgment we must review.[15]

1. *Waiver*

As a threshold matter, we conclude that Haramis waived his objection to interest starting to accrue on costs and attorney fees as of the entry of judgment, because he did not timely object to the judgment on that ground in the trial court. (See *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1052.)

In the first place, Haramis did not object to the form of the judgment proposed by Pejiu, which provided that Pejiu would recover "its attorneys' fees, costs and expenses in the sum of $_____ with interest thereon at the rate of ten percent (10%) per annum *from the date of the entry of this Judgment* until paid." (Italics added.)

It was clear from the proposed judgment that interest would accrue from the date of the judgment, on the amount of costs and attorney fees determined by the court. It was also clear that the court would determine those costs and fees at some later time, since the court was not going to be able to simply write in the amount of costs and attorney fees before entering the judgment: the amounts would have to be determined pursuant to a memorandum of costs (Cal. Rules of Court, rule 3.1700) and a noticed motion (Code Civ.

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[15] Indeed, the trial court's use of the phrase "nunc pro tunc" in directing entry of the costs on the judgment merely indicated that the costs should be included in the judgment as if they had been calculated (as well as awarded) at the time of judgment entry.

Proc., § 1033.5, subd. (c)(5); Cal. Rules of Court, rule 3.1702), while the judgment had to be entered promptly after the statement of decision (Code Civ. Proc., § 664). (See Code Civ. Proc., § 1033.5, subd. (c)(5) [attorney fees pursuant to a contract shall be fixed upon noticed motion, not at the time of the statement of decision]; see also Code Civ. Proc., § 685.020, subd. (a) [interest commences to accrue on a money judgment on the date of entry of the judgment, except for installment judgments].) In fact, the court specifically stated in the statement of decision that Pejiu would recover its costs and attorney fees, "the amount of which is to be determined in a *later* proceeding." (Italics added.)

Furthermore, even if (as Haramis insists) it was not clear from the *proposed* judgment that costs and fees would be ascertained later by the court, but interest thereon would run from the date of judgment entry, this certainly became clear from the judgment ultimately entered by the court. Haramis never objected to, nor sought relief from, the judgment on this ground in the trial court. While his attorney complained orally about entry of the costs order nunc pro tunc, this was not a proper challenge to the dictates of the judgment itself. (See, e.g., *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 182.)

2. *Interest Accrues from Entry of Judgment*

Whether or not Haramis waived his objection, the objection lacks merit.

Where as here a judgment provides for an award of costs, but the amount of the award is to be determined at a later time, the court clerk enters the costs on the judgment after the amount is determined. (Cal. Rules of Court, rule 3.1700(b)(4).) In other words, the amount of the cost award is incorporated into the judgment. (Code Civ. Proc., § 685.090, subds. (a), (b).) The same goes for attorney fees, which are awarded as an element of costs (Code Civ. Proc., § 1033.5, subd. (a)(10)), albeit calculated by way of a separate noticed motion (Code Civ. Proc., § 1033.5, subd. (c)). When the amount of a cost award and the amount of an attorney fees award are added to the judgment, the date of judgment entry does not change. Postjudgment interest at the rate of 10 percent per annum accrues on the principal amount of the judgment (Code Civ. Proc., § 685.010), including the amount of the cost award and attorney fees award, as of the date of

judgment entry (Code Civ. Proc., § 685.020, subd. (a).) Therefore, interest begins to accrue on the cost and attorney fees portion of the money judgment as of the same time it begins to accrue on all other monetary portions of the judgment – upon entry of judgment.

Haramis argues that interest cannot begin to run until the court has determined the amounts on which interest is to run. He relies on Code of Civil Procedure section 685.010, subdivision (a), which provides: "Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment *remaining unsatisfied*." (Italics added.) That provision, however, simply means that interest does not accrue on any monetary portion of a judgment that has been paid.

III. DISPOSITION

The judgment and orders are affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.